No. 41677-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON



IN RE: WASHINGTON BUILDERS BENEFIT TRUST,

RE SOURCES FOR SUSTAINABLE COMMUNITIES,
A-1 BUILDERS, SF MCKINNON COMPANY INC.,
CABINETWORKS, LIVING SPACE, et al.,

Appellants/Cross-Respondents,

vs.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, et al.,

Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE CAROL A. MURPHY

# REPLY/CROSS-RESPONDENT'S BRIEF

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## I. INTRODUCTION

BIAW's argument – that "[t]he trust at issue here is fundamentally a business arrangement" (BIAW Br. 47) – confirms what the trust beneficiaries[1] have alleged from the beginning of this case – that the Defendants approached their fiduciary duties with their own bottom line, and not the interests of the trust beneficiaries, in mind. The Defendants did not form a "business arrangement." The Defendants formed a trust, and voluntarily undertook fiduciary duties that they now seek to avoid through various post hoc arguments and rationalizations. This court should reject the Defendants' arguments and hold them responsible for breaching their fiduciary duties as trustees.

## II. REPLY TO RESTATEMENT OF FACTS

### A. The Trial Court's Unchallenged Findings Of Fact Are Verities On Appeal.

The BIAW Defendants have challenged only seven of the trial court's 78 findings of fact. These unchallenged findings are now verities on appeal. ***In re Marriage of Petrie***, 105 Wn. App.

[1] The individual Petitioners in this case are referred to as either "Petitioners" or "trust beneficiaries." Other beneficiaries of the WBBT are referred to as the "employer participants" or "trust beneficiaries" as appropriate.

268, 275, 19 P.3d 443 (2001) (relying on unchallenged findings to affirm removal of trustee).

**1. BIAW Is Not A Beneficiary Of WBBT. BIAW Controlled The Structure And Financial Arrangements Of WBBT And Owed Fiduciary Duties To The Employer Participants Who Are The Beneficiaries Of The WBBT.**

The BIAW Defendants assert that BIAW is a beneficiary of the WBBT. (*E.g.*, BIAW Br. 6, 23, 25, 39) But the trial court made no such finding, and in an unchallenged finding the trial court found that "[t]he employer participants are beneficiaries of the WBBT." (FF 19, CP 7145)

In unchallenged findings, the trial court found that the BIAW Defendants had a choice in how to structure WBBT and arrange its finances:

- BIAW chose to establish the trust as the method of holding the funds it received from the Department of Labor and Industries. It could have chosen not to create a trust. The choice was made after consideration of tax consequences and other impacts to BIAW, its members, and the employer participants.

(FF 13, CP 7143)

- BIAW chose to use a trust and to allocate responsibilities among BIAW, BIAW-MSC, and WBBT in this manner partially to reduce taxes and liability.

(FF 18, CP 7144-45) The BIAW Defendants now concede that they "created WBBT to hold and invest refunds received by BIAW from the DLI [Department of Labor and Industries], until those funds are distributed to participants," (BIAW Br. 5-6) and chose to "allocate[e] . . . responsibilities among BIAW, MSC, and WBBT . . . due in part to tax and liability considerations." (BIAW Br. 10)

The BIAW Defendants also have not assigned error to the findings that establish their fiduciary duties to Petitioners and other beneficiaries:

> • WBBT trustees owe fiduciary duties to the trust beneficiaries, which include petitioners."), FF 29, CP 7146 ("BIAW-MSC staff handles the trust funds . . . .

(FF 23, CP 7145)

> • When BIAW-MSC was handling trust money by apparent authority of the trustees, fiduciary duties attached to the handling of those trust funds."

(FF 30, CP 7147)

**2. BIAW And MSC Shared Officers And Resources, And Commingled Trust And Non-Trust Funds, As Well As Retained Interest Earned On Trust Funds.**

In unchallenged findings, the trial court found a close relationship between BIAW, MSC, and WBBT, that included sharing of resources:

- Each member of the executive committee of BIAW-MSC also sits on the executive committee of BIAW. Each board member of BIAW is also a board member of BIAW-MSC. The local affiliates appoint members to BIAW and BIAW-MSC boards. BIAW-MSC does not hold board meetings of its board of directors or executive committee separate from BIAW board and executive committee meetings. BIAW-MSC and BIAW have a consolidated budget. . . .

(FF 31, CP 7147)

- WBBT has no staff and, instead, relies upon certain joint staff of the BIAW and BIAW-MSC. There is no documentation of delegation of duties by trustees to BIAW-MSC. There is no documentation of safeguards in that relationship, such as requiring segregated accounts or billings for services provided.

(FF 28, CP 7146)

- The trustees allowed BIAW-MSC to administer trust funds. The trustees did not expressly delegate to BIAW-MSC trust duties, but, rather, acquiesced in this arrangement. It is not clear whether the trustees, BIAW staff, or BIAW-MSC staff ever considered whether the trust was operating consistent with the 1994 Declaration of Trust or the enrollment agreements.

(FF 64, CP 7153) *See also* BIAW Br. 5 (MSC "is BIAW's wholly-owned for-profit subsidiary."); BIAW Br. 6 ("WBBT has no staff. It relies upon MSC to provide administrative support, calculate and process refunds").

The BIAW Defendants also concede that they commingled MSC's funds with trust funds by depositing trust funds in MSC's

bank account, and that they retained interest earned on trust funds while they were in MSC's account:

- The amount of the Department of Labor and Industries funds plus the interest earned could have been transferred to the WBBT investment account, but it was not.

(FF 35, CP 7148)

- BIAW-MSC earns and retains interest on all these funds while they are in BIAW-MSC's money market account between the time funds were transferred from the WBBT investment account and the time the participant's check was presented.

(FF 46, CP 7150)

- BIAW-MSC's money market accounts, which hold trust funds, also contain BIAW-MSC's own funds. The Court has already determined that this constitutes commingling and is a breach of trust. . . .

(FF 52, CP 7151) *See also* FF 32-33, 41, CP 7147, 7149; BIAW Br. 13 ("MSC retains this inbound float interest."); BIAW Br. 15 ("MSC earns and retains interest on these funds").

The trial court's unchallenged findings also establish that the BIAW Defendants have no documentation authorizing MSC to retain interest and that WBBT never made a formal decision that MSC could retain interest as "compensation" for its services:

- Although the declaration of Trust provides that the trustees may employ and pay for the services of other to assist them, BIAW-MSC has not billed WBBT for

the services it performs for the trust. Although there was testimony that retention of interest by BIAW-MSC was a fair exchange for the services provided, there is no documentation that the trustees ever authorized such payment nor a record of the value of the services involved in the exchange.

(FF 55, CP 7151-52)

- Testimony on this subject was inconsistent, and the Court finds that no formal decision by the trustees occurred regarding this exchange.

(FF 56, CP 7152)

- [T]here has been no presentation of contemporaneous records, forensic accounting, or other documentation of the actual value of BIAW[-] MSC's trust administration services. It is not clear from the testimony and exhibits what services precisely are provided solely for the enrollment fee.

(FF 54, CP 7151)

### 3. The BIAW Defendants Did Not Perform The Annual Accountings Required By The Declaration Of Trust.

The trial court found that the "trustees did not meet" the requirement in section 12 of the Declaration of Trust to conduct "an annual review of the trust's books for account and records of all transactions." (FF 59, CP 7152; *see also* 9/14 RP 86) The BIAW Defendants do not assign error to this finding.

#### 4. The Trust Beneficiaries' Claims Were Not Frivolous And Their Efforts To Benefit The Entire Trust Were Sincere.

Neither the BIAW Defendants nor the Master Builders Association of King and Snohomish Counties ("MBA") challenge the trial court's findings that the trust beneficiaries' claims were not "frivolous" and that their "efforts to benefit the entire trust" were sincere. (Fee FFs 7 and 8, CP 8111)

### B. Substantial Evidence Supports The Findings Of Fact Challenged By The BIAW Defendants.

The seven findings of fact challenged by BIAW Defendants (BIAW Br. 2) are supported by substantial evidence:[2]

#### 1. The Declaration Of Trust Was Signed Only By The Trustees And Was Not Distributed To The Employer Participants. The Enrollment Agreement Is The Only Document That Shows The Intent Of The Employer Participants.

The trial court found that the Declaration of Trust was signed only by the trustees and was never broadly distributed to the employer participants. (FF 17, CP 7144) While the BIAW Defendants now assign error to this finding, the BIAW Defendants

[2] The BIAW Defendants also assign error to Finding of Fact 33, (CP 7148) which reiterates the trial court's holding on summary judgment that the inbound interest was a trust asset. The trust beneficiaries address this challenge in Argument § III.B, addressing the trial court's summary judgment ruling. The BIAW Defendant's and MBA's assignments of error to Fee FF 4 (CP 8110), which declined to award the Defendants fees based on the Enrollment Agreement, is addressed in Argument § IV.D.

stipulated to this fact in prior litigation regarding the Marketing Assistance Fee in federal court. (CP 4487-88) In any event, BIAW's own witnesses confirmed that the employer participants did not sign the Declaration of Trust and that it was not BIAW's intent to bind employer beneficiaries to the terms of the Declaration of Trust. (9/14 RP 137-138, 187; 9/16 RP 42; *see also* CP 4487-88)

The trial court also found that "The enrollment agreement is the only trust document that shows the intent of the employer participants." (FF 26, CP 7146) Petitioner Sheila McKinnon testified that she had never seen the Declaration of Trust or even knew of its existence until this suit. (9/13 RP 201) The Enrollment Agreement was the only document seen, let alone signed, by employer participants. (9/13 RP 201; 9/14 RP 137-138, 187; 9/16 RP 42) It is the only document that can reflect their intent.

**2. Petitioners Became Beneficiaries Of The Trust When BIAW Received Premium Adjustments From The Department Of Labor And Industries.**

"Petitioners became beneficiaries of WBBT when funds were received by BIAW from the Department of Labor and Industries." (FF 24, CP 7145) The BIAW Defendants' challenge to this finding fails in light of the language of the Enrollment Agreement itself. (CP 4471 ¶ 6: "Any Premium Returns payable to BIAW by DLI

under the DLI Agreement *shall be held in trust* by the Trust for Participants. . . ." (emphasis added); s*ee also* 9/16 RP 42 ("enrollment agreement creates an obligation for the member to pay the enrollment fee and for the trust to hold and distribute the premium refunds").

### 3. Defendants Could Have Returned Interest Earned On Trust Funds To The Trust.

MSC could have sent checks directly to the trust beneficiaries rather than first sending them to the local associations to then distribute to the beneficiaries. (9/16 RP 124-27; *see also* FF 45, CP 7150) By choosing to give the checks to local associations for distribution, the BIAW Defendants delayed the trust beneficiaries from cashing their checks. (9/16 RP 129, 133; *see also* BIAW Br. 14-15) The trial court correctly found that the interest accruing because of "the employer participants' delay[] [in] depositing their checks" was unknown. (FF 48, CP 7150)

The trial court found that "BIAW-MSC retained this interest although it could have returned it to WBBT. This interest was not difficult to calculate or to return to the trust." (FF 48, CP 7150) The BIAW Defendants conceded that they could have established a separate WBBT account and that had they done so, interest would

have automatically accrued to WBBT instead of MSC. (9/16 RP 68-72, 80; 9/13 RP 133-34; 9/16 RP 201; *see also* FF 35, CP 7148; CP 5650, 6103-04)

#### 4. The BIAW Defendants Never Sent Beneficiaries The Annual Accounting Required By RCW 11.106.020.

The trial court found, based on essentially undisputed evidence, that "[p]rior to this action, WBBT had never provided beneficiaries with an annual statement as required by RCW 11.106.020."[3] (FF 61, CP 7152) The trust beneficiaries never received an accounting from the BIAW Defendants prior to this suit. (9/13 RP 184; 9/14 RP 146-47; *see also* CP 2355-85; FF 59, CP 7152) BIAW's Executive Vice President of 20 years, Tom McCabe, was not aware of annual accounting requirements and could not recall ever sending an accounting to beneficiaries. (9/13 RP 138-41; *see also* 9/14 RP 86; CP 4206-09; FF 59, CP 7152) Trust beneficiaries were forced to file a motion for an accounting under RCW 11.106.040 (CP 130-46, 423-25, 457-879)

[3] The BIAW Defendants provide no argument in support of their assignment of error to this finding and thus it is also waived. ***Smith v. King***, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

## III. REPLY ARGUMENT

The BIAW Defendants owed fiduciary duties to the trust beneficiaries, and could not meet their burden "to demonstrate no breach of loyalty has been committed." ***Wilkins v. Lasater***, 46 Wn. App. 766, 777, 733 P.2d 221 (1987). This court should reverse the trial court's grant of summary judgment on the Marketing Assistance Fee (CP 4996-5015) and the trial court's judgment allowing the BIAW Defendants to retain their profit from secretly siphoning interest earned on trust funds. (CP 8115-56)

### A. The Trial Court Erred In Holding That The BIAW Defendants Did Not Breach Their Fiduciary Duties By Taking An Undisclosed 20% Profit From Trust Funds.

The trial court erred in holding that the employer participant-trust beneficiaries authorized the BIAW Defendants' admitted practice of paying itself and its affiliates millions under the guise of a "marketing assistance fee." This court should reverse the trial court's grant of summary judgment to the BIAW Defendants and enter judgment in favor of the trust beneficiaries. At a minimum, this court should reverse and remand for a trial to determine whether the employer participants authorized the 20% payments as a marketing assistance fee and whether such fee was reasonable.

### 1. The Enrollment Agreement, The Only Trust Instrument Provided to Trust Beneficiaries, Did Not Authorize the BIAW Defendants' Unrestricted Use Of The Twenty Percent "Marketing Assistance Fee."

Trusts instruments are strictly construed, to prohibit self-dealing. RCW 11.100.090 (Trustee may not engage in self-dealing "[u]nless the instrument creating the trust expressly provides to the contrary"); 3 Austin Scott, et al., *Scott and Ascher on Trusts* § 17.2.11, p. 1138 (5th Ed. 2007) ("[T]he courts require the governing instrument to authorize, expressly and by specific language, each act that would otherwise constitute an act self-dealing; courts typically construe such language narrowly."). The BIAW Defendants concede the Marketing Assistance Fee payments to MSC (BIAW's wholly owned, for-profit subsidiary) would constitute impermissible self-dealing unless authorized by a trust instrument. (BIAW Br. 24 (such transactions are permissible "[w]here the trust instrument allows")). The BIAW Defendants' claim that they had unrestricted use of trust funds transferred to them "for marketing and promotion of the Plan" is not supported by the Enrollment Agreement – the only document that the trust beneficiaries ever saw.

The Enrollment Agreement authorized the WBBT trustees "to transfer ten percent (10%) of the Participants' Premium Returns

applicable to the Coverage Period to local associations and 10% to BIAW *for marketing and promotion of the Plan*." (CP 4470; Ex. 2227 at 4) (emphasis added) The Marketing Assistance Fee was "*for* marketing and promotion;" it was not *for* the BIAW Defendants' unrestricted use and generation of millions of dollars of profit.[4]

The phrase "further authorizes" does not support the BIAW Defendants' argument that the trust documents gave them unrestricted use of the Marketing Assistance Fee. (BIAW Br. 17-18) The petitioners have not argued that the trust document did not authorize a marketing assistance fee, but that the BIAW Defendants' use of the Marketing Assistance Fee for non-marketing purposes and their failure to disclose this use violated the terms of the trust. (CP 1524-50, 3039-49; App. Br. 17-32)[5] The BIAW Defendants concede that these funds are not spent on marketing (BIAW Br. 26-27; *see also* CP 8832-34 (showing "ROII Marketing"

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[4] The BIAW Defendants argue in passing that they did not self-deal because they did not "obtain a pecuniary benefit." (BIAW Br. 24) It was undisputed, however, that the BIAW Defendants reaped millions of dollars from the Marketing Assistance Fee. (CP 464)

[5] The minutes from meetings of WBBT's predecessor trust establish that the Marketing Assistance Fee was always intended to be compensation for marketing and promotion. (*See* CP ___ [Sub No. 595 at 170, 178] ("Locals should document expenses against their 10% marketing assistance fee;" "the marketing assistance fees are reimbursement for marketing efforts"); *compare* BIAW Br. 25 (arguing the "original intent" of the marketing assistance fees was to "generate revenue" for BIAW))

is less than 10% of "Retro 10%"), in violation of the plain language of the Enrollment Agreement.

The BIAW Defendants embraced a much narrower interpretation of this language before this lawsuit, when MSC's executive director sent letters to employer participants claiming that 20% of the refund is paid to affiliates "***for their expenses*** in marketing and promoting the program." (CP 9623-29; *see also* CP 8963-64, 8996-97; Ex. 2015) (emphasis added). To the extent the language authorizing the Marketing Assistance Fee is susceptible to two meanings, this court must adopt an interpretation that does not allow profiteering by the BIAW Defendants. ***Wilkins***, 46 Wn. App. at 774-77; 3 Scott, et al., *supra*, § 17.2.11, p. 1138.[6]

The trial court erroneously attempted to "harmonize" the enrollment agreement with the 1994 Declaration of Trust, an instrument the trust beneficiaries never saw. Because the trust beneficiaries – the employer participants who were the settlors of

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[6] *See also* ***In Re Anneke's Trust***, 229 Minn. 60, 38 N.W.2d 177, 183 (1949) ("It is the better rule that if the settlor intends to waive the protection afforded by law against self-dealing by a trustee he must say so in clear and unmistakable language."); ***City Bank Farmers Trust Co. v. Taylor***, 76 R.I. 129, 69 A.2d 234, 240 (1949) ("The presumption of the law is against such [self-dealing] and, in the absence of clear provision to the contrary, all doubts regarding the scope of the language upon which the claim for such a power is made must be resolved against the party making the claim").

the trust – were the only parties who by instrument could relax the BIAW Defendants' duty of loyalty, the trial court erred in relying on language in the 1994 Declaration of Trust. RCW 11.97.010 (trustor may relieve trustee of duties "by the provision of the trust").

Rather than strictly construe the language authorizing the Marketing Assistance Fee, the trial court construed it "very broadly." (CP 4876) This court should reverse the grant of summary judgment authorizing the BIAW Defendants' self-dealing payments.

### 2. The Defendants' Past Practice Of Not Disclosing The Marketing Assistance Fee's Use Or Size Confirms They Breached Their Fiduciary Duties.

The BIAW Defendants assert that the trust beneficiaries consented to the BIAW Defendants' unfettered use of marketing assistance fee funds because BIAW's own publications and "media reports explain[ed] the importance of retro refund revenue to BIAW," (BIAW Br. 26; *see also* BIAW Br. 20) BIAW's unilateral reports cannot establish the employer participants' intent to give the BIAW Defendants carte blanche over the Marketing Assistance Fee. In fact, these communications underscore the BIAW Defendants' misrepresentations about both the size and their use of the Marketing Assistance Fee.

The BIAW Defendants' own publications cannot contradict the settlors' intent as established from the Enrollment Agreement itself. ***Templeton v. Peoples Nat. Bank of Washington***, 106 Wn.2d 304, 309, 722 P.2d 63 (1986) (the "trial court should not have admitted extrinsic evidence to determine Dr. Templeton's trust intent since such intent can be derived solely from the four corners of the trust document."). The only evidence of the settlors' intent is the only document they signed, the Enrollment Agreement – not BIAW's own self-serving publications.

In any event, the sources cited by the BIAW Defendants as extrinsic evidence do not show that the employer participant/trust beneficiaries intended to allow the BIAW Defendants unfettered use of the Marketing Assistance Fee, but instead confirm that the BIAW Defendants misled the trust beneficiaries. (*See, e.g.*, CP 2057 (money sent to the locals is "for their expenses in marketing and promoting the program"), CP 2066 (BIAW "retains a percentage of the refund amount for its expenses in administering claims and safety programs"), CP 2068 (same), CP 2070 ("BIAW retains 20 percent of the refund amount for its expenses in administering the program."), CP 2072 ("The fee is clearly explained in the contract signed by each of BIAW's ROII members."), CP 8853 (stating that

ten percent of the refunds are "paid to BIAW's sixteen local associations for their expenses in marketing and promoting the program") (cited BIAW Br. 20, 26))

BIAW sent misleading letters directly to trust beneficiaries about the use of the Marketing Assistance Fee. (CP 8963, 8992, 8996 (each stating that ten percent of the refunds are paid to BIAW's "local associations for their expenses in marketing and promoting the program") (cited BIAW Br. 27)) The BIAW Defendants never disclosed to the trust beneficiaries that they used the funds for non-marketing purposes, let alone that the Marketing Assistance Fee generated millions in profit.

The newspaper articles cited by the BIAW Defendants (BIAW Br. 20 n. 9, 26) also fail to reflect an intent to give the BIAW Defendants unrestricted use of the Marketing Assistance Fee, and instead confirm that trust beneficiaries had no idea how the twenty percent retained by BIAW was used. (*E.g.*, CP 2117 (member stating "We didn't realize what they were doing with the money."); CP 2087 (editorial stating that "BIAW should make it a regular practice to inform its members where every penny of the refund goes so members can give accurate, informed feedback."))

The BIAW Defendants' failure to provide an accounting to the trust beneficiaries further demonstrates their concealment of the use and size of the Marketing Assistance Fee. Rather than providing a "written itemized statement of all current receipts and disbursements,"[7] the newsletters and letters cited by Defendants contain only general and inaccurate discussions of the program. The BIAW Defendants' own self-serving publications and media statements cannot fulfill the duty to account to the beneficiaries and to inform beneficiaries fully of all facts that would aid them in protecting their interests. (*See* App. Br. 29-30)[8]

The extrinsic "evidence" cited by the BIAW Defendants does not establish the intent of the employer participants, but rather confirms that the defendants breached their fiduciary duties. The trial court erred in not holding the BIAW Defendants responsible for these breaches.

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[7] RCW 11.106.020: "*The trustee or trustees* . . . shall mail or deliver at least annually to each adult income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income." (emphasis added)

[8] The trial court found in an unchallenged finding that "[t]he Declaration of Trust Section 12 requires an annual review of the trust's books for account and records of all transactions. The trustees did not meet this requirement." (FF 59, CP 7152) The trial court then erred in failing to hold the BIAW accountable for their breach of fiduciary duties.

### 3. The Trial Court Erred In Holding That The BIAW Defendants Did Not Breach Their Fiduciary Duty By Taking The Marketing Assistance Fee Before Final Adjustments .

Even were the unilateral secret Declaration of Trust relevant to discerning the employer participants' intent, the Declaration of Trust requires that the Marketing Assistance Fee be paid "*after* payment of all expenses and *final Adjustments by DLI [Department of Labor and Industries].*" (CP 4481; Ex. 2027 at 6 § 11 (emphasis added). "[F]inal Adjustments by DLI" occur at the end of the three-year period during which DLI reviews claims for each plan year. (CP 1603; *see also* FF 15, CP 7144; BIAW Br. 9) As they concede, the BIAW Defendants paid themselves the Marketing Assistance Fee *before* final adjustments. (BIAW Br. 13-14, 25; *see also* CP 1603)[9] The BIAW Defendants' own expert acknowledged that the practice of paying the Marketing Assistance Fee before final adjustments cost the beneficiaries millions of dollars in additional interest and earnings. (CP 4560; *see also* CP 6198-99, 6269-6277, 6287-88)

[9] Contrary to the BIAW Defendants' contention (BIAW Br. 25), the trial court did not find that BIAW was a beneficiary of the trust, but rather a fiduciary charged with protecting the interests of the beneficiaries, the employer participants. *See* Fact § II.A.1, *supra*.

The BIAW Defendants do not address this condition in the Declaration that they rely upon to establish their duties, which they clearly violated. (BIAW Br. 25) To the extent the Declaration of Trust is ambiguous, it should be construed in favor of the beneficiaries, not in favor of the BIAW Defendants. ***Wilkins***, 46 Wn. App. at 774-77. The early payment of the Marketing Assistance Fee was a breach of the BIAW Defendants' fiduciary duties.

**4. At A Minimum The BIAW Defendants' Breaches Of Fiduciary Duty Under the Terms of The Trust Instruments Presented Issues Of Fact.**

This court should hold as a matter of law that the Enrollment Agreement did not authorize the BIAW Defendants' unfettered use of the Marketing Assistance Fee, or its early payment. At a minimum, this court should remand so that the BIAW Defendants can meet their burden of proving that their use of the Marketing Assistance Fee was reasonable and that it was fairly disclosed and consented to by the settlors. (App. Br. 31-32; ***Wilkins***, 46 Wn. App. at 780 (remanding so defendant-trustee could meet his burden to "disprove these alleged breaches of fiduciary duty").

## B. The Trial Court Erred In Refusing To Require The BIAW Defendants To Disgorge Profits They Siphoned From Trust Funds In Violation Of Their Fiduciary Duties.

A trustee may not retain *any* profit from a breach of fiduciary duty. Restatement of Trusts (Second) § 205.[10] The BIAW Defendants concede that they breached their fiduciary duties by commingling trust funds with MSC's funds and retaining interest earned on trust funds. (BIAW Br. 13, 31; *see* also 9/13 RP 148-49; 9/16 RP 78) This court should reject the BIAW Defendants' argument that their illicit profits were "de minimis," hold that it is not unduly burdensome for the BIAW Defendants to return interest to beneficiaries, and reverse the trial court's order allowing the BIAW Defendants to retain interest earned on trust funds.

### 1. The BIAW Defendants Established The WBBT And Cannot Blame Their Own Choices In Structuring The Trust For Their Breaches Of Fiduciary Duties.

The BIAW Defendants argue that they should be allowed to retain interest earned on trust funds because it would be too difficult

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[10] *See also* 4 Austin Scott, et al., *Scott and Ascher on Trusts* § 24.9 at 1687 (5th Ed. 2007) ("the trustee will not be allowed to profit from a breach of trust, even if the profit does not come at the expense of the trust estate"); Bogert and G. Bogert, *The Law of Trusts and Trustees*, § 862 at 63 (2d rev. ed. 1995) ("a trustee is liable for any profit he has made through his breach of trust even though the trust has suffered no loss"); Restatement of Trusts (Second) § 203 ("The trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust.").

to distribute it to beneficiaries. (*E.g.*, BIAW Br. 33 ("The cost of processing a second distribution check to each participant would be significant, likely exceeding the amount of the interest."))[11] But the BIAW Defendants had complete control over how the WBBT and ROII program were structured, and cannot rely on their own choices in structuring the WBBT and ROII program as an excuse for their breach of fiduciary duties.

As the trial court found, and BIAW concedes, BIAW established the WBBT, controlled its structure and financial arrangements, and established MSC to administer the WBBT. (BIAW Br. 5-8; FF 13, 14, 18, CP 7143-45; 9/16 RP 81; 9/13 RP 133-34; 9/14 RP 197-98; 9/15 44-45, 53) BIAW chose to commingle MSC and WBBT funds, rather than establishing a separate WBBT account. (9/16 RP 68-69; 9/13 RP 133-34; *see also* CP 6103; FF 32-33, 41, 46, 52, CP 7147-51) Had it established a separate account, interest would have automatically accrued to the WBBT instead of MSC. (9/16 RP 69-72, 80; CP 5650, 6103-04; *see also* FF 35, CP 7148) BIAW cannot excuse its breach of

[11] The BIAW Defendants cite 9/16 RP 228:6-8 to support this contention. (BIAW Br. 33) The cited testimony does not discuss the cost of a second distribution check, but contains defendants' expert testimony of his expert witness fees.

fiduciary duty by citing "administrative burden" and "expense" that are a direct result of its own breach of its fiduciary duties.

The BIAW Defendants' argument that the trust beneficiaries failed to "mitigate" their damages because they delayed cashing their checks fails for the same reason. (BIAW Br. 36, 40) Had the BIAW Defendants chosen to write the checks from WBBT accounts, rather than from their own commingled accounts, all of the interest would have automatically accrued to the Trust, regardless of when the checks were cashed. The BIAW Defendants also could have sent the trust beneficiaries their checks directly. (FF 45, CP 7150; 9/16 RP 124-27) Instead, the BIAW Defendants transferred WBBT's funds to MSC accounts, then distributed MSC checks to local associations for distribution to beneficiaries, which then handed out refund checks at local "check parties," only then mailing them to beneficiaries who could not attend. (FF 41, 44, 45, CP 7149-50) This delay was the BIAW Defendant's choice, not the trust beneficiaries' fault. (FF 45, CP 7150; 9/16 RP 129-33; BIAW Br. 14, 36) The BIAW Defendants cannot blame a system they created and controlled for the accrual of outbound interest.

### 2. Neither The Enrollment Agreement Nor The Declaration Of Trust Authorized The BIAW Defendants To Retain Interest Earned On Trust Funds.

The BIAW Defendants cite no provision of the Enrollment Agreement or Declaration of Trust that grants them the "discretion" to siphon interest from trust funds. (BIAW Br. 31) The language of both the Enrollment Agreement and Declaration of Trust required the BIAW Defendants to distribute interest to its rightful owners – the trust beneficiaries.

The trial court rejected the BIAW Defendants' argument that under RCW 11.104A.070, DLI adjustments only become subject to trust duties once the BIAW Defendants chose to transfer to the WBBT account the refunds that they deposited in MSC's account. (BIAW Br. 31; *see* CP 4878) The BIAW Defendants' position that they may "tak[e] fees and interest from the premium refunds with impunity," (CP 4878), is refuted by the plain language of the Enrollment Agreement, which requires that "[a]ny Premium Returns payable to BIAW by DLI under the DLI Agreement *shall be held in trust* by the Trust for Participants." (CP 4471 ¶ 6 (emphasis added)) The Enrollment Agreement gives the BIAW Defendants discretion as to *when* to declare a distribution, but once a

distribution is declared, it includes "*any interest* or benefit accruing from the investment" of the adjustments. (CP 4471 ¶ 6; Ex. 2227 at 4, ¶ 6) (emphasis added); *see also* CP 4471 ¶ 10 ("Premium Returns" include "interest, principal and profit"))[12]

The Declaration of Trust likewise mandates that "[t]he Trustees shall hold in trust for the benefit of the Employer Participants . . . *all Adjustments transferred to BIAW by the DLI* together *with all accruals thereto and income therefrom.*" (CP 4480; Ex. 2027 at 5 (emphasis added); *see also* CP 4459 (WBBT Investment Policy that WBBT's purpose is "To hold and protect the Industrial Insurance refund dollars that *belong to the members of the BIAW's Retrospective Rating Program.*") (emphasis added)) The Declaration of Trust defines the WBBT "Fund" as "all things of value held by the Trust for the benefit of the Employer Participants, including all Adjustments and *all interest*, dividends, refunds, or income of any sort earned on the Fund . . . ." (CP 4477; Ex. 2027 at 2) (emphasis added) This aligns with the purpose of the trust, "[t]o distribute Adjustments and *any interest*, return or other

[12] The Enrollment Agreement also provides that should a member default on its obligations that it forfeits its return and "*any interest* or profit associated with such Premium Return." (CP 4471 ¶ 7; Ex. 2227 at 5 ¶ 7 (emphasis added)) The members could not forfeit their right to interest if they never had it, as BIAW Defendants now argue.

property obtained as a result of administration of a Fund, to the Employer Participants . . . ." (CP 4478; Ex. 2027 at 3) (emphasis added)

The BIAW Defendants never disclosed to beneficiaries that refunds were not trust funds while in MSC's possession. (9/16 RP 84-85) Rather than supporting MSC's right to retain interest earned on trust funds, both the Enrollment Agreement and the Declaration of Trust require that this interest be distributed to the beneficiaries.

### 3. A Trustee May Not Profit From A Breach Of Fiduciary Duties Regardless Of The Size Of The Breach.

The BIAW Defendants persuaded the trial court that even though they breached their fiduciary duties by retaining over $400,000 in interest earned on trust funds,[13] they could retain this profit because it is "de minimis," by erroneously focusing on the interest denied the individual trust beneficiaries. (BIAW Br. 32-34; FF 49, CP 7150-51; CL 9, CP 7155) But the BIAW Defendants deprived beneficiaries of over $400,000 in interest, not a de minimis sum by any definition. (FF 33, 35, 47; CP 7148, 7150)

[13] The BIAW Defendants calculated interest for only a portion of the time period at issue in the suit. (9/16 RP 182-83)

Petitioners sought on behalf of all trust beneficiaries the return of interest wrongfully withheld by the BIAW Defendants. (CP 8707-08 ("Petitioners may seek at trial . . . equitable relief requiring the State Defendants to repay to the [WBBT] amounts determined to have been wrongfully taken, received, or retained"); *see also* App. Br. 35-40) Each beneficiary of the trust was served with a summons and the petition (FF 5, CP 7142), a procedure to which the BIAW Defendants stipulated. (CP 116-29) The BIAW Defendants could not defeat Petitioners' right to seek relief on behalf of all trust beneficiaries by expelling Petitioners from the ROII. (BIAW Br. 37 n.22; 9/13 RP 181; 9/14 RP 145; 9/15 RP 94) *See* ***McBride v. PLM Int'l, Inc.***, 179 F.3d 737, 743 (9th Cir. 1999) (employee had standing to challenge employer's actions under ERISA after being terminated because "the employer should not be able through its own malfeasance to defeat the employee's standing").

The BIAW Defendants argue that "the law does not impose liability for the de minimis amounts at issue," and that a trustee may retain profit earned through a breach of fiduciary duty so long as the amount is small enough. (BIAW Br. 32 (*citing* ***Erickson v. Erickson***, 30 Wn.2d 914, 194 P.2d 954 (1948); ***Breaks v. Spokane Auto Co.***, 93 Wash. 143, 160 P. 291 (1916); ***Sorrel v.***

***Eagle Healthcare, Inc.***, 110 Wn. App. 290, 38 P.3d 1024, *rev. denied*, 147 Wn.2d 1016 (2002)) The Washington cases cited by BIAW do not involve trust funds, and the few out-of-state cases that do involve trusts are inapposite.[14] The DLI regulation cited by BIAW, WAC 296-17-90445, did not allow DLI to *keep* small refunds, but instead allowed participants to *deduct* small refunds from the next premium payment.

BIAW's contention that it may retain refunds that are small individually but significant in the aggregate undermines the principle that a trustee may not profit from the trust. It would encourage trustees to breach their fiduciary duties so long as their obligations run to many beneficiaries who each have small claims, even if the aggregate benefit to the fiduciary is significant. This court should reject the BIAW Defendants' argument that they should be allowed to retain over $400,000 in profit from their breach of fiduciary duty.

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[14] ***Sorrel*** did not involve "accrued interest on funds held in trust" as BIAW claims (BIAW Br. 32-33), but "prepaid charges" for nursing home care that the court expressly held were *not* held in trust. *See* 110 Wn. App. at 296; *see also* ***In re Morgan Guar. Trust Co. of New York***, 89 Misc.2d 1088, 396 N.Y.S.2d 781, 787 (N.Y.Sur. 1977), ("there is no question that the common trust fund benefitted since the said sum was accrued in the fund in the succeeding quarter"); ***Finkelstein v. Finkelstein***, 502 A.2d 350 (R.I. 1985) (trustees did not profit from a breach of fiduciary duty, and were not required to provide annual accountings because the beneficiary received financial reports providing the same information).

### 4. MSC May Not Retain Interest Earned On Trust Funds As "Compensation" For Services To The Trust Where It Is Undisputed That The Trustees Never Authorized MSC To Do So.

The BIAW Defendants assert that their secret retention of trust interest was a wash, because it was "compensation" for the services they provided WBBT. (BIAW Br. 34-35, 40) But the trial court found no evidence that the trustees ever authorized MSC to retain interest as "compensation." (FF 54-56, CP 7151-52) The BIAW Defendants have not assigned error to these findings.

This court held that the trustee failed to meet his burden of proving he had not profited from the lease of trust farmlands to himself, because the trustee "presented no documents whatsoever demonstrating he had not, in fact, profited from the lease" and because his "self-serving testimony is insufficient to meet what we view is the increased burden of proof he bears as a fiduciary" in ***Wilkins v. Lasater***, 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987). The present case is identical to ***Wilkins***. As the trial court found in its unchallenged findings, "BIAW-MSC has not billed WBBT for the services it performs for the trust . . . . [T]here is no documentation that the trustees ever authorized such payment nor a record of the value of the services involved in the exchange." (FF

55, CP 7151-52; FF 54, CP 7151 ("[T]here has been no presentation of contemporaneous records, forensic accounting, or other documentation of the actual value of BIAW[-]MSC's trust administration services"))

The trial court rejected the BIAW Defendants' self-serving testimony as a post hoc attempt to justify its breach of fiduciary duty. (FF 56, CP 7152) *See* ***Wilkins***, 46 Wn. App. at 772, 778 (rejecting trustee's testimony that "his fertilizer and hauling costs . . . probably saved the trusts money" in the absence of supporting documentation).[15] A trustee cannot profit from his trust. The trial court properly rejected the BIAW Defendants' characterization of its secret profit of over $400,000 as "compensation" under an undocumented agreement.

### 5. Retention Of Interest Is A "Usual And Customary" Practice Only For Institutional Trustees.

The BIAW Defendants claim trustees routinely retain interest earned on trust funds. (BIAW Br. 35) But retention of interest

[15] *See also* ***Lydia E. Pinkham Medicine Co. v. Gove***, 303 Mass. 1, 20 N.E.2d 482, 489 (1939) (rejecting argument that breaching fiduciaries were entitled to a "credit" because "the plaintiff derived some incidental advantage from the fact that these defendants saw fit not to have the plaintiff pay them other moneys which they could have demanded"); Levmore, *Bank Trust Departments and "Float" Revenue: Finding the Proper Procedures* (1981) 98 Banking L.J. 817, 832-34 (rejecting the argument that "if the revenues from these floats are denied the bank . . . fees will need to be raised and beneficiaries will be no better off.").

earned on trust funds is a "usual and customary" practice only of institutional trustees who make self-deposits in their own commercial accounts. *See* Levmore, *supra*, 98 Banking L.J. at 8-19; 3 Scott, *supra*, § 17.2.14.1, pg. 1152 (discussing rule "allow[ing] a corporate trustee to deposit such funds in its own bank"); Bogert, *supra*, § 543(K) at 355-59; RCW 11.100.030, 11.100.037 (allowing self-deposit by institutional trustees); ***Van de Kamp v. Bank of America***, 204 Cal.App.3d 819, 251 Cal. Rptr. 530, 546 (1988) ("the *bank-trustee* may profit from the use of such funds by means of self-deposit") (emphasis added).[16] The evidence cited by BIAW shows that financial institutions expressly obtain the consent of the settlors to retain interest and disclose the practice to beneficiaries. (CP 1694 (listing in "Disclosures" practice of retaining float interest); CP 8302 (retention of float interest is "a usual and customary

[16] In ***Van De Kamp***, the court held that a *bank* with both trustee and commercial operations could deposit trust funds into its commercial accounts, and ten benefit from the use of these funds while they awaited investment or distribution, because California statutes authorized such practice. The California court noted that "[a]bsent such statutes, it would be a clear violation of the duty of loyalty to make such self-deposits." 251 Cal. Rptr. at 534. The court also relied on the fact that there were no feasible methods for returning the interest to beneficiaries. 251 Cal. Rptr. at 546. Here, it is undisputed that if the BIAW Defendants had simply opened a separate account in WBBT's name, interest would have *automatically* accrued to the beneficiaries. *See* Fact § II.B.3.

practice *in the financial services industry whether the firm is a trust company, brokerage, or a bank*") (emphasis added)) (BIAW Br. 35)

The BIAW Defendants are not institutional trustees with commercial bank accounts. The BIAW Defendants deposited trust funds in their own private account, commingled those trust funds with their own, and then secretly retained the interest earned on the trust funds. This is not a "usual and customary" practice; it is a breach of fiduciary duty.

### 6. The BIAW Defendants' "Good Faith" Is Irrelevant Because A Trustee May Not Profit From A Breach Of Trust.

The BIAW Defendants argue that MSC's retention of interest "seemed reasonable" at the time, and thus they acted in good faith. (BIAW Br. 38-39) But a trustee may not profit from a breach of trust, regardless of his or her good faith. ***Wilkins***, 46 Wn. App. at 779 ("Although [defendant]'s breaches may not have been made with the conscious intent to profit personally from the trusts, as noted above, his good faith is irrelevant."); *see also* 46 Wn. App. at 778 n.7 ("good faith is not a defense to a breach of trust"); Restatement of Trusts (Second) § 201 comment b; Restatement of Trusts (Second) § 203; Bogert, *supra*, § 543 at 247 ("Good faith on the part of the trustee is not a defense against a claim of disloyalty.");

***Van de Kamp***, 251 Cal. Rptr. at 534 ("It does not matter that a trustee may have acted in good faith; self-dealing in violation of the duty of loyalty cannot be justified by the good faith of the trustee.").

Moreover, the trial court's unchallenged findings refute the BIAW Defendants' alleged "good faith." The BIAW Defendants did not put safeguards in place to prevent this breach (FF 28, CP 7146), and tried to justify their practices with post hoc rationalizations. (FF 56, CP 7152) This is not good faith.

### 7. Petitioners Never Waived The Right To Seek Equitable Relief On Behalf Of All Beneficiaries.

"Where . . . the beneficiaries of a trust sue the trustee in order to restore funds to the trust, the action is considered equitable in nature." ***Allard v. Pac. Nat. Bank***, 99 Wn.2d 394, 400-01, 663 P.2d 104 (1983). The BIAW Defendants argue that because the trust beneficiaries waived their right to individual damages, they are barred from suing for any monetary relief, including the right to restore the trustee's ill-gotten profits to the trust. (BIAW Br. 40-41) According to the BIAW Defendants, the court was powerless to award any monetary relief.

The trial court held that "Petitioners have properly invoked the Court's equity jurisdiction under RCW 11.96A and RCW 11.106,

and the Court, therefore, has broad discretion to fashion appropriate equitable relief." (CP 7155) BIAW ignores the trial court's "wide discretion" to determine that the case was primarily equitable in nature. ***Allard***, 99 Wn.2d at 400.[17]

Petitioners sought the same remedy as in ***Allard***, "to restore funds to the trust." 99 Wn.2d at 400. Thus, the action is equitable. (CP 1039, 7067-68, 7070) Petitioners properly enforced their equitable right to restore funds to the trust on behalf of themselves and the other trust beneficiaries.[18]

### C. The Trial Court Erred In Dismissing MBA On The Basis That It Was Not A Trustee And Did Not Owe Any Fiduciary Duties Upon Receiving Marketing Assistance Fee Funds.

The Master Builders Association of King and Snohomish Counties ("MBA") concedes that it received the annual marketing assistance fee payments from the BIAW Defendants, knowing that the Marketing Assistance Fee constituted trust funds and was intended for the limited purpose of "marketing and promotion of the

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[17] ***Kelly v. Foster***, 62 Wn. App. 150, 813 P.2d 598, *rev. denied*, 118 Wn.2d 1001 (1991) (BIAW Br. 40-41), was an "ordinary legal malpractice action" and did not involve breaches of fiduciary duties by a trustee. 62 Wn. App. at 154-55.

[18] Petitioners were authorized to represent other beneficiaries by TEDRA and by the doctrine of virtual representation. (CP 8707-08 ("Petitioners may seek at trial . . . equitable relief requiring the State Defendants to repay to the [WBBT] amounts determined to have been wrongfully taken, received, or retained"); App. Br. 35-40)

Plan." (MBA Br. 4, 11, 14) Based on this concession alone, this court should hold that the trial court erred in dismissing the MBA.

MBA argues that it cannot be liable because it did not have the "clairvoyance" to know that using trust funds that had been designated for marketing for non-marketing purposes would constitute a breach of trust. (MBA Br. 10-11) MBA cannot escape liability by pleading ignorance to a practice it helped establish and of which that it concedes it was aware.[19]

A transferee has fiduciary duties with respect to trust property it receives with knowledge that the transfer is a breach of trust. (MBA Br. 10; App. Br. 41-42) It is not sufficient for MBA to deny knowledge that it was "receiving the MAF in breach of trust." (MBA Br. 10) MBA concedes that is was aware of, and indeed actively relies on, the language of the Enrollment Agreement

[19] MBA's argument that Petitioners waived their assignment of error to the trial court's dismissal of MBA because it "is not developed sufficiently" (MBA Br. 9, 12) is without merit. Petitioners argued that the MBA, as a local association, received the Marketing Assistance Fee knowing it was "for marketing and promotion of the Plan," and that the MBA nevertheless spent little on marketing. (App. Br. 11-13, 26 (citing, *e.g.*, CP 4627 ("no one expects that all or even most of this money will actually go toward marketing ROII at the local level"), 28-29, 40-42) MBA responded fully to Petitioners' argument that the MBA should be required to return marketing assistance fee funds. (MBA Br. 9-14) This court should decide the issue on the merits. RAP 1.2(a); ***Washington Ass'n of Neighborhood Stores v. State***, 149 Wn.2d 359, 372 n.3, 70 P.3d 920 (2003) (denying respondent's motion to strike or disregard argument because "there was not a complete failure to raise the issue and no real prejudice or inconvenience is present").

requiring that marketing assistance fee funds be spent "for marketing and promotion of the Plan." (*E.g.,* MBA Br. 14; *see also* CP 4724) While MBA was not required to be "clairvoyant," it was required to use trust funds for trust purposes.

MBA disavows its role in establishing the Marketing Assistance Fee, ignoring that the Marketing Assistance Fee was one of the practices established at MBA's suggestion in the predecessor trust and carried forward into the 1994 Declaration of Trust. (App. Br. 40 citing CP 2776-80; *see also* CP 1895-96, 1907-10, 1916, 1950-52, 1958-59, 1969-70, 4246, 4723-24; Sub. No. 595 at 53, 55, 62, 159-61, 178; Ex. 2027 at 1; 9/13 RP 72)[20] MBA approved the transfer of funds from the predecessor trust to the current WBBT and approved the 1994 Declaration of Trust containing the language authorizing the Marketing Assistance Fee. (CP 1900, 2395, 2400, 2403-04, 4889-93; Sub. No. 595 at 163-65, 168-69) MBA distributed the enrollment agreements and misleading marketing materials (*E.g.*, CP 3197; *see also* CP 4621-

[20] Contrary to MBA's assertion (MBA Br. 12), Petitioners cited legal authority for the proposition that one who participates with a trustee in a breach of trust is liable for the breach of trust. (App. Br. 42 (*citing* Bogert, *supra*, § 901 at 304; *see also* Restatement of Trusts (Second) § 326))

22, 4724) that never disclosed that 20% would be taken from the trust or that MBA was making a profit.

It was error to dismiss MBA before trial in light of the substantial evidence that MBA participated in the breach of trusts by establishing and approving the Marketing Assistance Fee, and distributing the enrollment agreement.

### D. The Trust Beneficiaries Are Entitled To Their Attorney's Fees Because They Provided Substantial Benefits To The Trust.

The trust beneficiaries provided benefits to the trust that are neither "trivial" nor "illusory." (BIAW Br. 44-49) The trial court erred in refusing to award them their attorney's fees.

The BIAW Defendants' contention that the trust beneficiaries lost on every "major" issue (BIAW Br. 46) ignores the trial court's finding that they obtained substantial relief for all beneficiaries. (*See* Fee FF 5, CP 8110) The trust beneficiaries sought and obtained a determination that a trust existed, an accounting of trust funds, a declaration that the BIAW Defendants were bound by the Enrollment Agreement, a declaration that the BIAW Defendants "owed fiduciary duties to the ROII Beneficiaries" and that the employers participants were the settlors of the trust, and a declaration that the BIAW Defendants were "in violation of their

fiduciary duties to the ROII beneficiaries." (CP 1015-40; CP 130-46, 423-25, 457-879, 4872-73; FF 17, 19, CP 7143-45; CL 3-5, CP 7154-55)

At trial, the trust beneficiaries established that the BIAW Defendants' practice of retaining interest was a breach of their fiduciary duties. (CL 3, CP 7154-55) The trust beneficiaries also overcame the BIAW Defendants' affirmative defenses that their retention of interest was "compensation" for MSC's services and that the exculpatory clauses of the trust documents excused the BIAW Defendants' misconduct. (FF 54-56, CP 7151-52; CL 2, CP 7154) They obtained prospective relief on behalf of all trust beneficiaries, requiring the BIAW Defendants to provide annual accountings, to cease commingling, and to stop siphoning interest from trust funds. (CL 3-4, 5, 11, CP 7154-56, 8115-16, 8134-35)

Far from being "illusory," this relief puts an end to long-standing breaches of trust and ensures that the BIAW Defendants will adhere to their fiduciary duties in the future. As the trial court found, the trust beneficiaries' claims were not "frivolous" and their "efforts to benefit the entire trust" were sincere. (Fee FF 7, 8 (unchallenged), CP 8110-11) The trial court's refusal to award fees was an error of law. *See* ***Allard***, 99 Wn.2d at 407-08; ***Wilkins v.***

***Lasater***, 46 Wn. App. at 781 (reversing trial court's denial of fees to trust beneficiary who did not obtain monetary relief but obtained substantial non-monetary relief, including an accounting).

By contrast, the BIAW Defendants did not benefit the trust or "vindicate[] the interests of the overwhelming majority of trust beneficiaries." (BIAW Br. 47)[21] The BIAW Defendants' adjudicated breaches of their fiduciary duties did not "benefit" the trust. ***Allard*** 99 Wn.2d at 407 ("A trustee who unsuccessfully defends against charges of breach of fiduciary duties obviously has not caused a benefit to the trust.").

BIAW argues that recent amendments to RCW 11.96A.150 undermine ***Allard*** and the established equitable principles on which the ***Allard*** Court based its holding that a trust beneficiary has the right to fees in remedying a breach of fiduciary duty by the trustee. (BIAW Br. 46) RCW 11.96A.150(1), which allows the trial court to consider "any and all factors that it deems to be relevant and appropriate" including "whether the litigation benefits the estate or trust involved," does not change the equitable rule that a

[21] The BIAW Defendants argue that an "overwhelming majority" of trust beneficiaries approved their practices based on the declarations of fewer than 2% of trust beneficiaries. (BIAW Br. 47 n.27 (citing declarations from 74 out of 6000 beneficiaries); *see also* CP 4977-82)

beneficiary who benefits a trust is entitled to attorney's fees. *See* RCW 11.96A.150(1) ("Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; [or] (b) from the assets of the estate or trust involved in the proceedings"); ***Allard***, 99 Wn.2d at 407-08.

This court should award the trust beneficiaries their fees from the BIAW Defendants because they established their breaches of fiduciary duty (App. Br. 44-46), and provided substantial benefits to the trust and all beneficiaries. At a minimum, the court should award fees from the trust estate. ***Monroe v. Winn***, 19 Wn.2d 462, 466, 142 P.2d 1022 (1943) (where beneficiaries secure results beneficial to the trust and trustee establishes right to continue administering the trust, "legal expenses incurred should be borne by, and paid out of, the trust estate").

## IV. ARGUMENT IN RESPONSE TO CROSS-APPEAL

### A. The Trial Court Did Not Err In Finding That The Enrollment Agreement Governed The Trust.

This court should reject the BIAW Defendants' argument that the Enrollment Agreement does not create a "trust instrument" as

contrary to the trial court's unchallenged findings, the plain language of the document, and fundamental trust principles. The Enrollment Agreement states that the WBBT "will receive, *on behalf of Participants*, all Premium Returns paid by DLI pursuant to this Agreement." (CP 4470 ¶ 3 (emphasis added); Ex. 2227 at 4 ¶ 3; *see also* FF 26, CP 7146) The Declaration of Trust contains similar language, stating that "The Trustees shall hold in trust *for the benefit of the Employer Participants . . . all Adjustments transferred to BIAW by the DLI* together with all accruals thereto and income therefrom." (CP 4480 § 1; Ex. 2027 at 5 § 1 (emphasis added))

That the WBBT trustees are not parties to the Enrollment Agreement has no bearing on their trust obligations. (BIAW Br. 29) A trustee need not consent to a trust document for a trust to be created. Restatement of Trusts (Second) § 35 ("A trust can be created without notice to or acceptance by the trustee."); Restatement of Trusts (Third) § 14. In any event, the trustees were well aware of the provisions of the Enrollment Agreement and conceded that the Enrollment Agreement imposed fiduciary duties on them. (CP 4477 (defining "Employer Participation Agreement" as "the agreement which an Employer Participant is required to execute prior to participating in a Plan for each Plan Year."); Ex.

2027 at 2; *see also* CP 1926, 2009; 9/14 RP 24; Sub. No. 595 at 201 (WBBT meeting minutes discussing enrollment fees and agreement); 9/16 RP 42 ("enrollment agreement creates an obligation for the member to pay the enrollment fee and for the trust to hold and distribute the premium refunds")) The trustees became bound to the Enrollment Agreement when they agreed to act as trustees for the funds governed by it.

The DLI regulations cited by the BIAW Defendants confirm the trust duties created by the Enrollment Agreement, making it "the responsibility of the sponsoring organization to distribute any refund to the group members," WAC 296-17-90445 (2010), and giving plan sponsors discretion in structuring their retro programs. WAC 296-17-90445 ("L&I does not regulate how refunds are distributed to group members.") *See* FF 8, CP 7142. Those regulations do not state that the retro refunds are owned by BIAW, or that BIAW is the settlor of the WBBT, as BIAW argues. (BIAW Br. 27-29)[22] The BIAW Defendants conceded they have fiduciary duties with respect

[22] DLI enacted the new regulation, WAC 296-17B-200 ("the refund is the property of the group sponsor"), relied upon by BIAW after the time period at issue in this suit. Because DLI changed the operative language, "a presumption exists that a change was intended." *See* ***Spokane County Health Dist. v. Brockett***, 120 Wn.2d 140, 154, 839 P.2d 324 (1992). Thus, the new regulation also confirms that the refund previously belonged to the employer participants, not to BIAW as the group sponsor.

to money received from DLI. (9/16 RP 79, 83; *see also* CP 5581) If the BIAW Defendants "owned" the adjustments, as they claim, then they could have simply pocketed the money, rather than "distribute any refund to the group members," as required by WAC 296-17-90445 (2010). *See* ***Ruocco v. Bateman, Eichler, Hill, Richards, Inc.***, 903 F.2d 1232, 1239 (9th Cir. 1990) (rejecting employer's argument that it was an ERISA trust settlor because the employer "did not pay the premium costs to fund the plan and therefore was neither a 'creator' nor 'settlor' of the trust."), *cert. denied*, 498 U.S. 899 (1990).[23]

Finally, the testimony of individual trust beneficiaries (BIAW Br. 30 n.17) that they did not subjectively intend to create a trust cannot contravene the objectively manifested intent that is plain from the four corners of the Enrollment Agreement. *See* ***Templeton v. Peoples Nat. Bank of Washington***, 106 Wn.2d 304, 309, 722 P.2d 63 (1986); *see also* Restatement of Trusts (Second) § 24 ("No particular form of words or conduct is necessary for the manifestation of intention to create a trust.");

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[23] The BIAW Defendants argue that DLI will look to the group sponsor for additional assessments. (BIAW Br. 29) BIAW, however, requires participants to pay a pro-rata share of any additional assessments. (CP 4471 ¶ 8; Ex. 2227 ¶ 8)

Restatement of Trusts (Third) § 13 comment b. The Enrollment Agreements provided that the WBBT would receive refunds on behalf of the employers and would hold them in trust.

### B. The Trial Court Correctly Found That Exculpatory Provisions In The Trust Documents Cannot Excuse The BIAW Defendants' Breaches Of Fiduciary Duty.

Exculpatory provisions are strictly construed, and may not relieve a trustee "of liability for any profit which the trustee has derived from a breach of trust." Restatement of Trusts (Second) § 222(2) and comment a; *see also* Restatement of Trusts (Third) (tentative draft) § 96; 4 Scott, *supra*, § 24.27.2, pg. 1804. The exculpatory provisions cited by the BIAW Defendants did not authorize their profits from the Marketing Assistance Fee or from trust interest.

Moreover, the exculpatory provisions cannot relieve the BIAW Defendants of their duty to act in good faith or perform an annual accounting as required by the Declaration of Trust. (FF 59, CP 7152; CP 4482; Ex. 2027 at 7 § 12) RCW 11.97.010 (BIAW Br. 43), which allows the waiver of certain statutory duties, expressly provides that "[i]n no event may a trustee be relieved of the duty to act in good faith and with honest judgment." RCW 11.97.010(1). The statute also provides that "Notwithstanding the breadth of

discretion granted to a trustee in the terms of the trust . . . the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." RCW 11.97.010(1). The trial court did not err in refusing to give effect to the exculpatory provisions.

### C. The Trial Court Properly Found That BIAW, MSC, And WBBT Committed Breaches of Trust.

The BIAW Defendants assert that the trial court "improperly lump[ed] State Defendants together" and held BIAW liable for MSC's and WBBT's breaches of fiduciary duty. (BIAW Br. 43-44) But the BIAW Defendants have not assigned error to any of the findings that support the trial court's conclusions of law. (*See* Fact §§ II.A.1-2) BIAW may not escape liability for its role in the breaches of fiduciary duty established by the trust beneficiaries.

BIAW is responsible for MSC's and WBBT's breaches of fiduciary duty because it is undisputed that BIAW established both MSC (BIAW's wholly-owned subsidiary) and the WBBT when it created the ROII program, and that BIAW, in its role as plan sponsor, participated fully in MSC's and WBBT's breaches of

trust.[24] (*See* Fact §§ II.A.1-2) *See* Bogert, *supra*, § 901 at 304; Restatement of Trusts (Second) § 326. BIAW cannot escape liability for its own choices in designing and establishing the ROII, MSC, and WBBT. The trial court rightly included BIAW among the State Defendants liable for breaches of fiduciary duty.

### D. Defendants Are Not Entitled To Their Attorney's Fees Under The Enrollment Agreement, Which Allows Fees Only For "Enforc[ing] The Member's Obligations."

The trust beneficiaries, not Defendants, are entitled to their attorney's fees based on equitable principles. *See also* ***Allard v. Pac. Nat. Bank***, 99 Wn.2d 394, 407, 663 P.2d 104 (1983) ("a trial court abuses its discretion when it awards attorney fees to a trustee for litigation caused by the trustee's misconduct."). The Enrollment Agreement, by its terms, authorizes fees only where litigation is necessary to "enforce" an obligation of a trust beneficiary. (BIAW Br. 49; MBA Br. 15-19):

> In the event BIAW or the Trust is required to hire legal counsel *to enforce the Member's obligations under this agreement*, the Member agrees to pay all legal

[24] For example, BIAW received the adjustments from DLI and deposited them into MSC's account. (FF 8, 16, 32; CP 7142, 7144, 7147; BIAW Br. 12) BIAW also provided WBBT with no staff with which to perform an accounting. (FF 13, 18, 28; CP 7143-46) BIAW's Executive Vice President even admitted that he was aware of MSC's practice of siphoning interest from trust funds, yet did not disclose this practice to the trustees. (CP 1917; *see also* CP 6974 (testimony of three-time WBBT chair Rick Tremaine stating that he was unaware of this practice))

> fees and cost incurred by the Trust or BIAW in any action or proceeding.

(CP 4471 ¶ 9 (emphasis added); Ex. 2227 at 5 ¶ 9)

This language is not general "prevailing party" language, which would allow either party to recover fees for any dispute based on the contract.[25] Defendants were not enforcing any contractual obligations of the trust beneficiaries, who paid all premiums demanded of them. *See* ***Keyes v. Bollinger***, 27 Wn. App. 755, 760-61, 621 P.2d 168 (1980) (refusing to award attorney's fees based on contract because it did not authorize fees for enforcing obligations at issue in suit); ***City of Tacoma v. City of Bonney Lake***, __ Wn.2d __, ¶ 32, 2012 WL 243611 (Wash. Jan. 26, 2012) (rejecting party's "incongruous request for attorney fees" under contractual provision it argued did not apply to it). The Enrollment Agreement's fee-shifting provision does not authorize

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[25] *Compare* ***Borish v. Russell***, 155 Wn. App. 892, 907, 230 P.3d 646 (2010) (contract allowed fees to prevailing party in suits "concerning this Agreement"), *rev. denied*, 170 Wn.2d 1024 (2011) (cited at BIAW Br. 49); ***Hill v. Cox***, 110 Wn. App. 394, 411, 41 P.3d 495 (2002) (In "any action to enforce the provisions of this contract, the prevailing party in such action shall be entitled to reimbursement by the losing party for its court costs and reasonable attorneys' costs and fees....") (cited at MBA Br. 16), *rev. denied*, 147 Wn.2d 1024 (2002); ***Brown v. Johnson***, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001) (fees allowed if any party "institutes suit concerning this Agreement") (cited at MBA Br. 16).

an award of fees for litigation involving the trustee's fiduciary duties with respect to trust assets.[26]

MBA has no claim for fees under an agreement that only authorizes the "BIAW or the Trust" to recover legal fees "*incurred by the Trust or BIAW.*" (CP 4471 ¶ 9 (emphasis added); Ex. 2227 at 5 ¶ 9) MBA is not the "BIAW or the Trust." Further, MBA cannot both be unbound by the Enrollment Agreement's requirement to spend the Marketing Assistance Fee on "marketing and promotion of the Plan," and entitled to receive fees under the Enrollment Agreement. If the restrictive language of the Enrollment Agreement does not directly apply to MBA, then any benefits reaped by MBA were incidental, and MBA has no rights to enforce under the Enrollment Agreement. ***Donald B. Murphy Contractors, Inc. v. King County***, 112 Wn. App. 192, 196, 49 P.3d 912 (2002) ("Merely incidental, indirect or inconsequential benefits to a third party are insufficient to demonstrate an intent to create a third-party beneficiary contract.").

MBA's alternative argument that the trust beneficiaries' claims were "meritless" (MBA Br. 20) ignores the trial court's

[26] Were the Enrollment Agreement's fee provision applicable, RCW 4.84.330, which forbids unilateral fee provisions, would allow any trust beneficiary to recover fees in litigation involving a suit by the BIAW or WBBT.

unchallenged findings that the trust beneficiaries' claims were not "frivolous" and that they were sincere "in their efforts to benefit the entire trust." (Fee FFs 7-8, CP 8111) As the Supreme Court recognized, a beneficiary is entitled to bring suit to challenge practices they believe are improper, and cannot be subjected to an award of attorney's fees for doing so:

> In the field of the law relating to trusts, trust funds and their administration, cases frequently arise in which interested parties may, in good faith, believe that the trust is not being properly administered and apply to the court for removal of the trustees, or seek other relief which they may believe will be beneficial to the trust estate. The trustees selected to administer the trust may resist the attempt to remove them, or they may be called upon to defend the trust itself. In such cases, the courts are quite in accord that the trust estate must bear the expense incurred as a part of the general cost of administration.

***Monroe v. Winn***, 19 Wn.2d 462, 466, 142 P.2d 1022 (1943).[27]

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[27] *Accord* ***In re Eichler's Estate***, 102 Wash. 497, 500-01, 173 P. 435 (1918) ("[T]o penalize appellant for daring to ask an adjudication upon a subject-matter that in right and conscience is probably her own would be to do a great wrong, and tend to discourage the assertion of legitimate claims."); ***Matter of Estate of Magee***, 55 Wn. App. 692, 696, 780 P.2d 269 (1989) (denying award of fees to personal representative from plaintiff personally because plaintiff "exercised good faith in bringing this appeal, which involves justiciable issues not previously resolved by case law"); ***In re Estate of Wright***, 147 Wn. App. 674, 688, 196 P.3d 1075 (2008) ("While we resolve the legal issues that Patterson raises in favor of the personal representative, those issues are not frivolous. . . . [W]e decline the personal representative's request for an attorney fee award."), *rev. denied*, 166 Wn.2d 1005 (2009).

Respondents cite no authority, and there is none, for an award of fees to a trustee who breached his fiduciary duties against the beneficiary who established the trustee's breach. This court should deny MBA's and BIAW Defendants' request for an award of fees.

## V. CONCLUSION

This court should reverse and remand with instructions to direct the BIAW Defendants and the MBA to restore to the trust the Marketing Assistance Fee and all interest wrongfully retained from the trust. Because this litigation was necessary to establish the existence of the trust, to remedy the BIAW defendants' breach of fiduciary duty, and to ensure compliance with those duties in the future, this court should also award the trust beneficiaries their attorney fees at trial and on appeal.

Dated this 27th day of February, 2012.

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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 27, 2012, I arranged for service of the foregoing Reply/Cross-Respondent Brief, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 27th day of February, 2012.

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